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Supreme Court, U.S.
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In The

Supreme Court of the United States

JEWELCOR INCORPORATED,
JEWELCOR JEWELERS AND DISTRIBUTORS, INC.
AND MARKETING OF JEWEL SERVICES, INC.,

Petitioners,

v.

MICHAEL KARFUNKEL AND GEORGE KARFUNKEL,
INDIVIDUALLY AND AS PARTNERS
TRADING AS M & G EQUITIES,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Circuit Court of Appeals for the Third Circuit misinterpreted a Pennsylvania savings statute, 42 Pa.C.S.A. § 5535(a), and, as a result, unconstitutionally deprived Petitioners Jewelcor Incorporated, Jewelcor Jewelers and Distributors, Inc. and Marketing of Jewel Services, Inc. (collectively, "Jewelcor") of due process of law.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioners state that they are privately held companies. No publicly held corporation owns more than 10% of the stock of any Petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 517 F.3d 672 (3d Cir. 2008). The opinion of the district court addressing the issue before this Court (App., *infra*, 19a-47a) is unreported.

STATEMENT OF JURISDICTION

The judgment, as amended, of the court of appeals was entered on March 13, 2008, and a timely-filed petition for rehearing was denied on April 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

> person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

42 Pa.C.S.A. § 5535(a) provides, in pertinent part:

> (1) If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination and any other party may interpose any defense or claim which might have been interposed in the original action or proceeding.

42 Pa.C.S.A. § 5535(a).

STATEMENT

This Petition is grounded on important issues concerning the interplay between state law, federal court jurisdiction and the corresponding protections afforded under the Due Process Clause of the United States Constitution. While this appeal concerns the interpretation of a state law savings clause, 42 Pa.C.S.A. § 5535(a), the misinterpretation of that Pennsylvania statute by a split decision of the United States Court of Appeals for the Third Circuit has the harsh effect of depriving Jewelcor of its constitutionally protected right to due process of law.

On October 5, 1990, Jewelcor and eleven related entities filed for relief under Chapter 11, Title 11 of the United States Bankruptcy Code. Despite the complexities of the bankruptcy proceedings, a joint consensual plan of reorganization was confirmed for Jewelcor in less than seven (7) months. As part of those proceedings, Jewelcor filed a motion to assume the lease of a commercial property in Mechanicsburg, Pennsylvania. In November, 1994, Jewelcor filed an adversary complaint against Respondents George and Michael Karfunkel, individually and as partners trading as M&G Equities (collectively, "M&G"), seeking damages for M&G's wrongful exercise of possession over the Mechanicsburg premises.

During the pendency of Jewelcor's adversary proceeding, Jewelcor vigorously attempted to litigate its claims on the merits. Unfortunately, the bankruptcy court did not administer Jewelcor's adversary proceeding as expeditiously as it administered much of Jewelcor's bankruptcy estate. Frustrated that its adversary claims were languishing, Jewelcor sought to consolidate those claims with the proceedings related to Jewelcor's then-pending motion to assume. The bankruptcy court denied that request on May 2, 1995. Thereafter, on September 27, 1995, Jewelcor filed in the district court a motion to withdraw the reference regarding its adversary proceeding in order to expedite a judicial determination of Jewelcor's claims. The district court denied that effort, without prejudice, on July 10, 1997. In its Opinion of that same date, the district court expressly declared that

"[i]f the bankruptcy court concludes that it does not have jurisdiction over the remaining issue, [Jewelcor] may file a new diversity action."

Left with no other recourse, Jewelcor continued, without success, to litigate its adversary proceeding claims on the merits.[1] It did so until the bankruptcy court dismissed Jewelcor's claims without prejudice on February 9, 1999. The bankruptcy court did so because the underlying bankruptcy issues had been resolved.

In response, and in accordance with the district court's prior ruling, Jewelcor filed a new action against M&G in the district court. Jewelcor's new action mirrored, in substantial part, the claims asserted by Jewelcor in the adversary proceeding. M&G moved to dismiss the complaint arguing, *inter alia*, that the claims were barred by the applicable statute of limitations. The district court denied M&G's motion, in part, because Jewelcor's claims in the adversary proceeding had been asserted timely, and that 42 Pa.C.S.A. § 5535(a) saved Jewelcor's claims given that Jewelcor had refiled in the district court within one year of the adversary proceeding being dismissed. When finally given the opportunity by the district court to litigate its claims on the

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[1] On June 15, 1998, at docket entry 1673, Jewelcor even filed a motion to recuse the court in the hope that another judge would move its case forward.

merits, Jewelcor obtained a judgment against M&G in the amount of $448,602.99, plus attorneys' fees.

M&G appealed the judgment and raised a host of issues on appeal, including the district court's refusal to dismiss Jewelcor's complaint on statute of limitations grounds. In a split decision, with Judge D. Brooks Smith dissenting, the Third Circuit vacated the judgment in favor of Jewelcor. The majority believed that the Pennsylvania Commonwealth Court's decisions in *Maxwell Downs, Inc. v. Philadelphia*, 638 A.2d 473 (Pa. Commw. 1994) and *Skehan v. Bloomsburg State College*, 503 A.2d 1000 (Pa. Commw. 1986) compelled the determination that Jewelcor's claims were time-barred. The majority did so despite the fact that it appeared to question the very soundness of those intermediate appellate court decisions. (App., *infra*, 7a-8a). The majority read *Maxwell Downs* and *Skehan* as standing for the proposition that Section 5535(a) applies only "when a civil action is commenced in and terminated by a Pennsylvania state court." (App., *infra*, 5a-6a). It found that the district court's conclusion that Section 5535(a) nevertheless saved Jewelcor's claims because it was part of the same jurisdiction as the bankruptcy court was "in tension with *Erie*'s mandate that '[w]e cannot give [the cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action.'" (App., *infra*, 9a) (*quoting Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949)).

Significantly, however, Judge Smith – in his dissent – recognized the important difference between the tolling of a statute of limitations and the operation of a savings provision. (App., *infra*, 10a). Properly considering the issue as one of first impression in Pennsylvania, Judge Smith read the broad language of Section 5535(a) to save a subsequent action filed within one year of the dismissal of a prior timely filed action based on lack of jurisdiction, with the viability of the subsequent action "not dependent upon the forum in which the original proceeding was initiated. . . ." (App., *infra*, 14a).[2]

This Petition seeks to have the Court remedy the Third Circuit's erroneous interpretation of a Pennsylvania saving statute in order to avoid manifest injustice by providing due process of law and fundamental fairness to Jewelcor.

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[2] It bears mentioning that Judge Smith's dissenting opinion in this matter was not filed until days after the entry of the majority's opinion, thus suggesting that the majority did not have the benefit of the reasoning employed in that dissent at the time the majority issued its decision. If it had, it is logical to assume that the majority would have at least attempted to distinguish the dissent's reference to the court's prior opinion in *Stinson v. Kaiser Gypsum Co.*, 972 F.2d 59 (3d Cir. 1992), wherein the court acknowledged that section 5535(a) governs in a situation where – as here – the original suit was dismissed by a federal court. *Id.* at 63.

REASONS FOR GRANTING THE PETITION

A. Review Is Necessary to Avoid Manifest Injustice and to Provide Fundamental Due Process of Law

Bankruptcy courts have discretion to relinquish jurisdiction over adversary claims if the dispute lingers beyond the conclusion of the administration of the bankrupt's estate. *See In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989) (bankruptcy courts may consider several factors in determining whether to retain jurisdiction). The bankruptcy court, in an exercise of that discretion, dismissed Jewelcor's adversary claims without prejudice after noting that Jewelcor "may file a new diversity action." Now, based on the Third Circuit's constitutionally endangering interpretation of Section 5535(a), whose plain language saves Jewelcor's cause of action, Jewelcor has been left without a forum to pursue its claims because the underlying statute of limitations on Jewelcor's claims expired while those claims were pending before the bankruptcy court. Jewelcor respectfully submits that this extraordinarily inequitable conclusion is erroneous on several grounds and must be remedied by this Court.

The Third Circuit's dismissal of Jewelcor's timely-filed and vigorously pursued claims without consideration on the merits raises fundamental due process concerns. Jewelcor did all it could do to timely litigate its claims against M&G. The bankruptcy court, however, dismissed Jewelcor's claims before it provided an opportunity for Jewelcor to present

its case on the merits. In doing so without prejudice, the bankruptcy court was apparently under the impression that Jewelcor could refile and litigate its claims in an alternative forum. The Third Circuit's erroneous interpretation of Section 5535(a), however, left Jewelcor without a judicial forum to litigate its claims, thereby depriving Jewelcor of its constitutional right to due process of law.

The United States Supreme Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). *See also Martinez v. California*, 444 U.S. 277, 282 (1980); *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971). In so holding, the Court has "read the 'property' component of the Fifth Amendment's Due Process Clause to impose constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* (*citing Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958) ("As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present its case and have its merits fairly judged").

In *Logan*, *supra*, an employee filed a charge with the Illinois State Fair Employment Practices Commission alleging that he was unlawfully terminated because of a physical handicap. The Commission, however, failed to conduct a conference within the

statutorily-mandated period. The employee did not cause or otherwise contribute to the Commission's failure to timely conduct the conference. On appeal, the Illinois Supreme Court determined that the Commission's failure to conduct the statutorily-mandated conference deprived the Commission of jurisdiction to hear the employee's claim. *Zimmerman Brush Co. v. Fair Employment Practices Comm'n*, 411 N.E.2d 277 (Ill. 1980). Thus, the employee was deprived of the opportunity to present his claim on the merits.

On review, this Court determined that the employee's Fourteenth Amendment right to due process of law had been violated. The instant facts are no less egregious. Jewelcor's adversary complaint was timely filed and all possible efforts were made by Jewelcor to litigate the merits of its claims. The bankruptcy court, however, elected to dismiss Jewelcor's adversary claims before it granted Jewelcor an opportunity to present its case on the merits. Thereafter, when the Third Circuit narrowly construed the applicable savings statute in a manner inconsistent with the expressed intent of the legislature, Jewelcor's constitutional right to have an opportunity to litigate its claim was likewise violated. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

The Third Circuit could have avoided this unconstitutional result by simply interpreting Section 5535(a) based on the clear and unambiguous language of the statute. On its face, Section 5535(a)

saves a subsequently filed action from the running of the statute of limitations if it is filed within one year of the termination of a timely filed prior action, regardless of the court in which the original and subsequent actions were filed. Section 5535(a) has already been held to "reflect a legislative determination of the Commonwealth's policy regarding limitations when a suit is dismissed. It provides that in most instances where dismissal is for a reason unrelated to the merits, limitations will not bar a new suit instituted by the plaintiff within a year." *Stinson v. Kaiser Gypsum Co., Inc.*, 972 F.2d 59, 63 (3d Cir. 1992). *See also In re Pennsylvania Footwear Corp.*, 199 B.R. 534, 546 (Bankr. E.D. Pa. 1996).

Instead of interpreting Section 5535(a) based on the plain language of the statute, the Third Circuit disregarded the foregoing authority and engaged in an alternative interpretation of the statute based on a clear misapplication of Pennsylvania law as demonstrated by Judge Smith in his well-reasoned dissent. This type of analysis runs afoul of the "repeatedly affirmed" rule of this Court that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526 U.S. 227, 239-40 (1999) (*quoting United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). Had the Third Circuit adhered to this long-standing principle, Jewelcor would not have been deprived of its right to seek recourse of its

claims through the courts as protected by the Due Process Clause of the Constitution.[3]

B. The Third Circuit's Order Should Be Reviewed Because Section 5535(a) Clearly Applies to Claims Filed in Federal Court.

Section 5535 of Title 42 provides, in pertinent part, as follows:

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[3] Notably, as referenced in the official comment to the statute, Pennsylvania's savings clause is "patterned after New York Civil Practice Law and Rules § 205." 42 Pa.C.S.A. § 5535 cmt. As explained by the Second Circuit Court of Appeals, the "obvious purpose of C.P.L.R. § 205(a) and its counterparts in many other states is to prevent the general statute of limitations from barring recovery because a court has ordered a timely action to be terminated for some technical defect that can be remedied in a new one." *Graziano v. Pennell*, 371 F.2d 761, 763 (2d Cir. 1967). Unlike the Third Circuit's constitutionally impermissible interpretation of Section 5535, federal courts sitting in the State of New York facing similar fact patterns have followed this rationale and construed Section 205 in a manner that guards against such an unconstitutional result. *See, e.g.*, *Hakala v. Deutsche Bank AG*, 343 F.3d 111 (2d Cir. 2003) (citation omitted) ("Given its remedial importance in guarding against capricious, unfair deprivation of a valuable claim, the Court of Appeals has cautioned that § 205(a)'s 'broad and liberal purpose is not to be frittered away by any narrow construction'"); *Allaway v. McGinnis*, 362 F. Supp. 2d 390 (W.D.N.Y. 2005). *See also* 1-2 NEW YORK CIVIL PRACTICE C.P.L.R. P. 205.09 ("As to prior actions commenced in a federal court within this state, it is clear that C.P.L.R. 205(a) applies").

> a. Termination of prior matter
>
> (1) If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination and any other party may interpose any defense or claim which might have been interposed in the original action or proceeding.

42 Pa.C.S.A § 5535(a).

By refusing to apply Section 5535(a) in accordance with its plain and encompassing terms, the Third Circuit fails to appreciate that the *Skehan* and *Maxwell Downs* decisions held only that the filing of an action in one court system did not toll the running of the statute of limitations upon an action subsequently filed in another court system. In neither decision did the Commonwealth Court, as Judge Smith correctly demonstrates in his dissent, address the application of Section 5535(a) as a savings statute. Further, in neither decision did the Court hold that Section 5535(a) applies only when the initial action is commenced and terminated in a state court. (App., *infra*, 13a-15a).[4]

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[4] The majority's conclusion that Pennsylvania's savings statute only applies to cases commenced and terminated in state court is also contrary to the New York court decisions applying NY CPLR 205 – the law upon which Pennsylvania's savings

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In *Skehan*, the Commonwealth Court held that "federal actions d[o] not ***toll*** the running of the statute of limitations on actions brought in a state court." 503 A.2d at 1005 (emphasis added). Similarly, in *Maxwell Downs*, the same Court held that an action filed in federal court did not ***toll*** the running of the statute of limitations upon claims subsequently asserted in state court. 638 A.2d at 475 (emphasis added). Both decisions relied heavily on *Royal-Globe Ins. Cos. v. Hauck Mfg.*, 335 A.2d 460 (Pa. Super. 1975), a case which pre-dated the enactment of Pennsylvania's savings statutes. In that case, the intermediate appellate court held:

> An action in state court does not ***toll*** the running of the statute of limitations against subsequent action in federal court. . . . And, similarly, an action in one state does not ***toll*** the running of the statute of limitations against action in another state. . . . Therefore, it would be inconsistent and unreasonable to toll the running of the statute of limitations against a cause of action in state court on the basis of an action in federal court.

Id. at 462 (emphasis added).

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statute is patterned. As referenced above, it is undisputed that NY CPLR 205(a) applies to prior actions commenced in a federal court within the state of New York. *See* 1-2 NEW YORK CIVIL PRACTICE C.P.L.R. P. 205.09.

As Judge Smith aptly noted, there is a significant difference between tolling a statute of limitations (whereby the running of the statute of limitations is suspended) and the application of a savings statute (whereby a timely-filed action may be refiled if dismissed after the limitations period). (App., *infra*, 10a-15a). *Skehan* and *Maxwell Downs* addressed only whether Section 5535(a) would toll the running of the statute of limitations. *See*, *e.g.*, *Maxwell Downs*, 638 A.2d at 476. The majority failed to appreciate this clear distinction.

Moreover, in *Maxwell Downs*, Section 5535 could not have applied to save the subsequently filed action because the initial action was decided on the merits and the second action was considered to be in the nature of a personal injury claim.[5] Likewise, in *Skehan*, the plaintiff did not even argue that the filing of a prior federal action "tolled" the running of the statute of limitations upon Section 5535(a) and, could not have done so, because he asserted different claims in the subsequent state action and the prior federal action was resolved on the merits. As such, neither *Royal-Globe*, *Skehan* nor *Maxwell Downs* address, let alone control, whether Section 5535(a) saved Jewelcor's Complaint from the operation of the statute of limitations.

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[6] Section 5535, pursuant to its express terms, does not save personal injury actions. 42 Pa.C.S.A. § 5535(a)(2)(i).

Even if the Third Circuit addressed the operation of Section 5535(a) as a saving statute, *Royal-Globe* and its progeny do not mandate the Court's decision. As set forth previously, those decisions merely held that the filing of an action in one court system does not toll the running of the statute of limitations upon a subsequent action filed in a different court system. *See also Ravitch v. Price-Waterhouse*, 793 A.2d 939, 942-43 (Pa. Super. 2002). They do not apply here because, as the district court found, it is part of the same court system as the bankruptcy court.

As a result of its misapplication of *Royal-Globe*, the Third Circuit also appears to have misunderstood the district court's rationale in rejecting M&G's statute of limitations defense. The district court did not refuse to follow state law. Rather, that court simply noted that it was part of the same court system as the bankruptcy court and that, as such, Section 5535(a) saved Jewelcor's claims from the operation of the statute of limitations. (App., *infra*, 32a-33a). Moreover, applying the Pennsylvania savings clause as it appears clearly to have been written does not transgress the mandates of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).[6]

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[6] *Erie* only mandates that federal courts apply state substantive law as interpreted by the state's highest appellate court, not that every case filed in federal court must be decided in exactly the same manner that it would have been if filed in state court. If, as adopted by the General Assembly, Pennsylvania's savings statutes would have only allowed Jewelcor to

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Finally, the Third Circuit's penultimate conclusion that Jewelcor could not have proceeded in state court after its claims were dismissed by the bankruptcy court is simply wrong. Under Section 5103(b), a Pennsylvania savings statute enacted the same day as Section 5535(a), Jewelcor could have transferred its claims to state court. Section 5103(b) provides, in pertinent part, that:

> In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a magisterial district judge of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in Paragraph (2).

42 Pa.C.S.A. § 5103(b)(1). By its express terms, Section 5103(b) would have allowed Jewelcor to transfer this action to a state court because the bankruptcy court is a "United States court" for a

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refile in federal court to obtain the benefit of their tolling provisions, this dichotomy would actually be mandated by the applicable state rules of decision.

district located in Pennsylvania and the adversary proceeding was dismissed for lack of jurisdiction. While Section 5103 typically applies where a district court dismisses for lack of subject matter jurisdiction in the early stages of the proceedings, its terms provide for a far wider application. *See, e.g., Kurz v. Lockhart*, 656 A.2d 160 (Pa. Commw. 1995) (Section 5103(b) would have allowed transfer to state court after federal court granted summary judgment on federal claims and dismissed pendent state claims for lack of jurisdiction); *Dimitris v. Lancaster County Prison Bd.*, 2002 U.S. Dist. LEXIS 11280, *32 (E.D. Pa. June 7, 2002) ("Accordingly, we will dismiss all state law claims, leaving plaintiff the option to refile any such claims in state court under the Pennsylvania saving clause, 42 P.C.S.A. § 5535"); *Fahnestock v. Reeder*, 223 F. Supp. 2d 618, 626 (E.D. Pa. 2002) ("Our dismissal is without prejudice to Plaintiffs' state rights to refile under the Pennsylvania saving clause, 42 Pa.Cons.Stat.Ann. § 5535").

CONCLUSION

For all or any of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE A. REIHNER
Counsel of Record

Dated: July 25, 2008

[A complete list of counsel appears on the cover]

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-2244, 05-4121 & 06-4003

JEWELCOR INCORPORATED; JEWELCOR JEWELERS AND DISTRIBUTORS, INC.; MARKETING OF JEWEL SERVICES CORP.,

Appellants in No. 05-4121

v.

MICHAEL KARFUNKEL; GEORGE KARFUNKEL; M & G EQUITIES; THE SALVATION ARMY

MICHAEL KARFUNKEL and GEORGE KARFUNKEL, individually and as partners trading as M & G Equities,

Appellants in No. 05-2244 & 06-4003

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:99-cv-1251)
District Judge: Honorable William J. Nealon

Argued June 28, 2007

Before: SMITH and GREENBERG, *Circuit Judges*, and POLLAK,* *District Judge*.

(Filed: February 11, 2008)

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OPINION OF THE COURT

POLLAK, *District Judge*

Appellants Michael and George Karfunkel, individually and as partners trading as M & G Equities (collectively referred to herein as "M & G"), appeal orders of the District Court denying M & G's

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* Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

motion to dismiss a breach-of-lease claim brought by appellees, Jewelcor Incorporated *et. al.* ("Jewelcor"), awarding judgment in favor of Jewelcor, and granting Jewelcor attorneys' fees. The District Court had diversity jurisdiction over this action under 28 U.S.C. § 1332 and this court holds jurisdiction pursuant to 28 U.S.C. § 1291. Appellants argue that the District Court erred in denying its motion to dismiss the breach-of-lease claim as time-barred by the Pennsylvania statute of limitations. For reasons explained herein, we find in appellants' favor and will reverse the District Court's orders.

I.

The case arises out of a sale-leaseback contract for a commercial property. Jewelcor entered into the contract in 1979 as the lessee. In 1989, M & G purchased the original lessor's interest in the property, assuming the conditions of the 1976 lease.

In October 1990, Jewelcor filed for Chapter 11 bankruptcy. In August 1991, M & G changed the locks on the property. Jewelcor initiated a suit against M & G seeking damages for breach of lease and unjust enrichment owing, in part, to this changing of locks. The complaint for that suit was filed in federal bankruptcy court in November 1994 and amended in October 1996. On February 9, 1999, the Bankruptcy Court dismissed Jewelcor's claims for lack of jurisdiction.

On July 15, 1999, Jewelcor initiated the instant action by filing, in the District Court, a complaint the

District Court found to be "substantially similar" to the amended complaint it filed with the Bankruptcy Court in October 1996. On February 22, 2000, the District Court, considering a motion to dismiss filed by M & G, dismissed some, but not all, of Jewelcor's claims. Jewelcor pursued one of the remaining breach-of-lease claims, Count I of its complaint, based on the August 1991 change of locks. The District Court entered judgment in Jewelcor's favor on March 22, 2005, and, on August 24, 2006, awarded Jewelcor attorneys' fees.[1] M & G now appeals, contending that the District Court erred in denying M & G's motion to dismiss Count I because the breach-of-lease claim was time-barred by the statute of limitations.[2]

II.

The action underlying Jewelcor's breach-of-lease claim occurred in August 1991. Jewelcor argues that the limitations period for its claim is four years, as provided by 42 Pa. Cons. Stat. § 5525(a)(8). Four years had elapsed by the time Jewelcor initiated the instant suit in July 1999. However, the District Court concluded that Pennsylvania's "savings statute," 42

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[1] In the same order, the District Court denied Jewelcor's motion for prejudgment interest. Jewelcor's cross-appeal of this issue, because we find in appellant's favor, is moot.

[2] M & G also raises seven other issues on appeal, which this court need not reach.

Pa. Const. Stat. § 5535(a),[3] preserves the claim in a federal forum.

As the District Court recognized, § 5535(a) does not preserve time-barred claims in a Pennsylvania state court if they were first commenced in a federal court. The statute provides that "[i]f a civil action or proceeding is timely commenced and is terminated, a party . . . may," regardless of whether the statute of limitations has run, "commence a new action or proceeding upon the same cause of action within one year after the termination." 42 Pa. Const. Stat. § 5535(a). Though this language is general in scope, Pennsylvania appellate courts interpret the provision

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[3] The statute provides that:

> (1) If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination and any other party may interpose any defense or claim which might have been interposed in the original action or proceeding.
>
> (2) Paragraph (1) does not apply to:
>
> > (i) An action to recover damages for injury to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
> >
> > (ii) An action or proceeding terminated by a voluntary nonsuit, a discontinuance, a dismissal for neglect to prosecute the action or proceeding, or a final judgment upon the merits.

42 Pa. Const. Stat. § 5535(a).

to apply only when a civil action is commenced in and terminated by a Pennsylvania state court.

A year before the enactment of § 5535(a), the Superior Court of Pennsylvania opined:

> An action in state court does not toll the running of the statute of limitations against subsequent action in federal court. . . . And, similarly, an action in one state does not toll the running of the statute in another state. Therefore it would be inconsistent and unreasonable to toll the running of the statute of limitations against a cause of action in state court on the basis of an action in federal court.

Royal-Globe Insurance Co. v. Hauck Manufacturing Co., 335 A.2d 460, 462 (Pa. Super. Ct. 1975). The Commonwealth Court makes clear that this holding trumps § 5535(a). *See Maxwell Downs v. City of Philadelphia,* 638 A.2d 473 (Pa. Commonw. Ct. 1994).

In *Maxwell Downs,* plaintiff filed a § 1983 action in federal court within the applicable statute of limitations period. The federal suit was dismissed on non-merits grounds. Fewer than two months later, after the statute of limitations on the claim had run, plaintiff re-filed its § 1983 action in the Court of Common Pleas. That court dismissed the suit as time-barred. Affirming this decision, the Commonwealth Court rejected the argument that § 5535(a) superceded *Royal Globe.* The court in *Maxwell Downs* wrote that, after § 5535(a) went into effect, the Commonwealth Court "decided *Skehan v. Bloomsburg*

State College.... Skehan, relying on ... language from *Royal-Globe*, held that 'federal actions did not toll the running of the statute of limitations on actions subsequently brought in a state court.'" *Maxwell Downs*, 638 A.2d at 486 (quoting *Skehan v. Bloomsburg State College*, 503 A.2d 1000, 1005 (Pa. Commonw. Ct. 1986).

Appellant argues that, in a diversity action, a federal court does not have authority to afford a recovery that would be unavailable in state court. The District Court rejected this argument, stating that, "[w]hile [M & G's] recitation of Pennsylvania State law is correct, it does not follow that in diversity actions this court must be viewed as a State Court and, in effect, a separate jurisdiction from U.S. Bankruptcy Court." The District Court then held that, while Pennsylvania case law would preclude Jewelcor from raising its time-barred claim in a state court, § 5535(a) nonetheless preserves the claim in a federal court.

III.

We agree with the District Court's conclusion that, under Pennsylvania case law, § 5535(a) does not preserve Jewelcor's claim in a state court.[4] But we

[4] The Supreme Court of Pennsylvania – which has not yet interpreted the scope of the Pennsylvania savings statute – could arguably conclude that the court in *Maxwell Downs* developed an overdrawn view of the statute's scope. However, while the Supreme Court may ultimately reject the Commonwealth Court's

(Continued on following page)

cannot accept its determination that the claim is nonetheless preserved in a federal court. In denying M & G's motion to dismiss, the District Court expressly rejected the principle that, when sitting in diversity, a federal court treats itself, for jurisdictional purposes, as a state court. However, *Erie v. Tompkins,* 304 U.S. 64 (1938), requires uniformity of results between state courts and federal courts sitting in diversity. Interpreting *Erie,* the Supreme Court stated that:

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holding in *Maxwell Downs,* we do not feel that we are in a position to do so on its behalf. In diversity cases, "where the applicable rule of decision is the state law, it is the duty of the federal court to ascertain and apply that law, even though it has not been expounded by the highest court of the state." *Commonwealth of Pennsylvania v. Brown,* 373 F.2d 771, 777 (3d Cir. 1967). Accordingly, "we must forecast the position the supreme court of the forum would take on the issue." *Clark v. Modern Group Ltd.,* 9 F.3d 321, 326 (3d Cir. 1993). In developing this forecast, "[a]lthough not dispositive, decisions of state intermediate appellate courts should be accorded significant weight in the absence of an indication that the highest state court would rule otherwise." *City of Philadelphia v. Lead Industries Ass'n, Inc.,* 994 F.2d 112, 123 (3d Cir. 1993). This standard places a significant constraint on us: "Although we are not bound in a diversity case to follow decisions of a state intermediate appellate court, . . . such decisions are not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Northern Insurance Co. of New York v. Aardvark Associates, Inc.,* 942 F.2d 189, 193 (3d Cir. 1991). We believe that we lack such "persuasive data," and consequently hold that *Maxwell Downs* provides our best guidance on how the Supreme Court of Pennsylvania would interpret the savings statute.

> In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1944). The District Court's conclusion is thus in tension with *Erie's* mandate that "[w]e cannot give [the cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action." *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 533-34 (1949). Accordingly, we hold that, since the Pennsylvania savings statute would not permit Jewelcor to pursue its time-barred claim in a state court, the statute cannot preserve the claim in a federal court.

IV.

For the foregoing reasons, we reverse in part the District Court's order of February 22, 2000 denying appellants' motion to dismiss Count I of Jewelcor's claims, vacate the District Court's subsequent orders, and remand with instructions to enter judgment in favor of Michael Karfunkel and George Karfunkel, individually, and as partners trading as M & G Equities, Inc.

SMITH, *Circuit Judge*, dissenting.

As the majority recognizes, we are bound by *Erie R. Co. v. Tompkins* to apply Pennsylvania's law regarding its statutes of limitations so that the outcome here will be the same as if the action had proceeded in a state court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1944) (discussing *Erie*, 304 U.S. 64 (1938)). Because Pennsylvania's Supreme Court has yet to interpret the scope of its savings statute, 42 Pa.Cons.Stat. § 5535(a), we must predict how that Court would apply the statute in this case. The majority concludes that the Pennsylvania Supreme Court would hold that § 5535(a) does not preserve Jewelcor's subsequent untimely federal claim because one of Pennsylvania's intermediate appellate courts "makes clear" that a time-bar "trumps § 5535(a)." Maj. op. at 7 (discussing *Maxwell Downs, Inc. v. City of Philadelphia*, 638 A.2d 473 (Pa. Commw. Ct. 1994)). I cannot agree. I believe that the majority's prediction of how the Pennsylvania Supreme Court would interpret 42 Pa.Cons.Stat. § 5535(a) in this case mistakenly relies on authority from an intermediate appellate court that never applied § 5535(a) as a savings provision. In the absence of a decision by a Pennsylvania appellate court addressing the scope of § 5535(a), I read the plain text of the statute to require its application here, thereby preserving Jewelcor's breach-of-lease claim.

There is a difference between the tolling of a statute of limitations and the operation of a savings provision. Tolling involves the suspension of the

statute of limitations, thereby extending or lengthening the period of time in which an action may be commenced. As we recognized in *Stinson v. Kaiser Gypsum Co.*, 972 F.2d 59 (3d Cir. 1992), however, a savings provision like § 5535 allows a "timely filed action dismissed after the limitations period" to be refiled if the dismissal was based on certain grounds. *Id.* at 62.

As the majority points out, *Royal-Globe Ins. Co. v. Hauck Mfg. Co.*, 335 A.2d 460 (Pa. Super. Ct. 1975), held that the commencement of a federal court action did not toll the statute of limitations for a subsequent state court action. *Id.* at 462. Inasmuch as *Royal-Globe* predated the enactment of § 5535, that decision concerned only the issue of tolling and had no occasion to apply the savings provision. *Royal-Globe* acknowledged, however, that there was a distinction between the tolling of the statute of limitations and the operation of a savings provision. It explained that the principle behind its holding had been accepted by the federal courts since the turn of the century, and quoted *Willard v. Wood*, 164 U.S. 502, 523 (1896), which instructed:

> The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, *in the absence of any statutory provision saving his right*, or where, from any cause, a plaintiff becomes nonsuit, or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred.

Royal Globe, 335 A.2d at 462 (quoting *Willard*, 164 U.S. at 523) (omitting internal quotation marks and citations) (emphasis added); *see also Stinson*, 972 F.2d at 62 (noting that "if a timely filed action is dismissed after the limitations period . . . has run, a new action on the same claim is time barred unless a limitations *savings statute* provides otherwise") (emphasis added).

In *Skehan v. Bloomsburg State College*, 503 A.2d 1000 (Pa. Commw. Ct. 1986), the Pennsylvania Commonwealth Court considered whether a federal district court action tolled a subsequent state court action. The Court applied *Royal Globe* and declared that the earlier federal court action, which had been resolved on the merits, did not toll the limitations period for the state court action. 503 A.2d at 1005. In deciding the tolling issue, the Court did not address the applicability of Pennsylvania's savings provision. Indeed, it could not have done so because the statute explicitly provides that the savings provision is inapplicable to an action terminated by "a final judgment upon the merits." 42 Pa.Cons.Stat. § 5535(a)(2)(ii).

Subsequently, in *Maxwell Downs, Inc. v. City of Philadelphia*, 638 A.2d 473 (Pa. Commw. Ct. 1994), the Pennsylvania Commonwealth Court merely came close to addressing the scope of § 5535(a)'s applicability. In that case, the plaintiff argued that its earlier timely federal action tolled the statute of limitations for its latter untimely state court action consistent with § 5535. The plaintiff failed to distinguish between tolling and the operation of the savings

provision, conflating the two concepts and arguing that *Royal Globe* was not controlling because it predated § 5535's "'tolling' provision," which was enacted in 1976. 638 A.2d at 476. The Court summarily rejected the plaintiff's argument that his federal court action had tolled his state court action. It explained that, despite § 5535's enactment, *Royal Globe* had been applied in 1986 in *Skehan* to render the second state court action untimely. Whether the second state court action, even though it was untimely because there had never been any tolling, could still proceed by virtue of the operation of § 5535(a) as a savings provision was neither argued by the plaintiff nor considered by the *Maxwell Downs'* Court.

Because *Maxwell Downs* never addressed whether a subsequent untimely federal action could be preserved and saved under § 5535(a), instead of tolled, and mindful that the Pennsylvania Superior Court recognized in *Royal Globe* the distinction between the operation of a savings statute and the tolling of a limitations period. I do not believe that *Maxwell Downs* can bear the weight accorded it by the majority. In the absence, then, of any decision by a Pennsylvania Court addressing the scope of § 5535(a) in saving a subsequent untimely action, I would predict how the Pennsylvania Supreme Court would interpret § 5535's applicability here by recourse to the plain text of the statute. *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004) (reiterating that "[t]he clearest indication of legislative intent is

generally the plain language of a statute"); *see also* 1 Pa.Cons.Stat. § 1921.

Section 5535(a) specifically states, in relevant part, that "[i]f a civil action or proceeding is timely commenced and is terminated, a party . . . may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination. . . . " The subchapter referenced is subchapter B, which establishes the limitation periods in Pennsylvania for various civil causes of action. *Compare* Title 42 Pa.Cons.Stat. Subchapter A, §§ 5501-5505 (establishing "General Provisions'), *with* Title 42 Pa.Cons.Stat., Subchapter B, §§ 5521-5538 (pertaining to "Civil Actions and Proceedings"). Thus, the plain text of the statute contemplates that it may be applied to preserve the vitality of a subsequent action even though that action may otherwise be time-barred by a limitations period set forth in subchapter B. The viability of the subsequent action, however, is not dependent upon the forum in which the original proceeding was initiated, as the majority concludes. Indeed, the statutory text is devoid of any limitation based on the forum of the initial action. Consistent with the plain text of § 5535(a), I submit that § 5535(a) was appropriately applied in this case, albeit for reasons other than those articulated by the

District Court. Accordingly, in my view the breach-of-lease claim refiled in the District Court was viable, even though time-barred.[5]

I respectfully dissent.

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[5] Because I have concluded that Jewelcor's breach-of-lease action in the District Court was saved by virtue of § 5535(a), I have considered the other arguments pressed by M & G, but believe them to lack merit. I would also reject Jewelcor's contention that the District Court improperly denied its claim for prejudgment interest as the motion was in fact untimely under Federal Rule of Civil Procedure 59(e).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-2244, 05-4121 & 06-4003

JEWELCOR INCORPORATED;
JEWELCOR JEWELERS AND DISTRIBUTORS,
INC.; MARKETING OF JEWEL SERVICES CORP.,

Appellants in No. 05-4121

v.

MICHAEL KARFUNKEL; GEORGE KARFUNKEL;
M & G EQUITIES; THE SALVATION ARMY

MICHAEL KARFUNKEL and GEORGE
KARFUNKEL, individually and as partners
trading as M & G Equities,

Appellants in No. 05-2244 & 06-4003

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:99-cv-1251)
District Judge: Honorable William J. Nealon

Before: SMITH and GREENBERG, *Circuit Judges,* and POLLAK,* *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued on June 28, 2007.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the District Court's Order of February 22, 2000 is REVERSED IN PART, the District Court's Order of Judgment of March 22, 2005 is REVERSED, the District Court's Order of August 24, 2006 is REVERSED IN PART, and this cases is REMANDED to the District Court with instructions to enter judgment in favor of the appellants, Michael Karfunkel and George Karfunkel, individually, and as partners trading as M & G Equities, Inc.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: February 11, 2008

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* Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[SEAL]

Certified as a true copy and issued in lieu of a formal mandate on May 8, 2008

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JEWELCOR INCORPORATED, JEWELCOR JEWELERS AND DISTRIBUTORS, INC., and MARKETING OF JEWEL SERVICES, INC.,	:	
Plaintiffs,	:	CIVIL NO. 3:99-CV-1251
vs.	:	
MICHAEL KARFUNKEL and GEORGE KARFUNKEL, individually and M & G EQUITIES, a general partnership, and THE SALVATION ARMY,	:	(JUDGE NEALON)
Defendants	:	

MEMORANDUM AND ORDER

(Filed Feb. 22, 2000)

Presently before the Court for consideration are two motions for summary judgment filed on behalf of defendants Karfunkel and M & G Equities (M & G)[1] on September 7, 1999 (Doc. 6), and defendant The Salvation Army on September 8, 1999 (Doc. 7). Briefs in support of both motions were submitted on September 27, 1999 (Docs. 10 & 12 respectively). Plaintiffs

[1] M & G Equities is a partnership consisting of Michael Karfunkel and George Karfunkel as general partners.

opposed both motions in separate briefs on October 12, 1999 (Docs. 13 & 14). Defendant The Salvation Army replied to plaintiff's opposition brief on October 20, 1999 (Doc. 15), and the Karfunkel defendants together with M & G Equities did the same on October 25, 1999 (Doc. 16). The motions are ripe for determination and, for the following reasons, the motions will be granted as to the Karfunkel defendants on Counts I, II, III, IV, V, and VI and as to the Salvation Army on Counts IV and VIII but denied on Count VII.

BACKGROUND

Plaintiffs in the present case are Jewelcor Incorporated ("Jewelcor"), Jewelcor Jewelers and Distributors ("JJD"), and Marketing of Jewel Services, Inc. ("MJS"), successor-in-interest to JJD.[2] In the present action, the plaintiffs set forth VIII counts:

> Count I seeks damages against M&G and the Karfunkels for breach of the lease when M&G changed the locks to the Mechanicsburg property and leased it to Good's Furniture in August, 1991, and later to the Salvation Army in November, 1992.
>
> Count II asserts a claim for wrongful and unreasonable withholding of consent by these defendants to sub-lease the premises

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[2] For purposes of clarity, the parties have identified all these entities collectively as Jewelcor and/or plaintiffs.

in January of 1990 to Office Max, Inc. and August of 1990 to Office Depot, Inc.

Count III alleges violations of the lease by these defendants in (a) refusing to consent to a proposed 1995 lease with Superpetz; (b) failure to provide a non-disturbance agreement; and (c) failing to tender quiet and peaceful possession.

Count IV asserts that all defendants, including the Salvation Army, intentionally interfered with a sub-lease plaintiffs had entered into with Superpetz in 1995.

Count V claims the M&G defendants were unjustly enriched by leasing to, and accepting rental payments from, Good Furniture in violation of the lease with plaintiffs.

Count VI similarly contends that the M&G defendants were unjustly enriched by leasing to, and accepting rental payments from, the Salvation Army.

Count VII alleges trespass by the Salvation Army in occupying the premises despite plaintiffs' right to possession.

Count VIII charges intentional interference by the Salvation Army with plaintiffs' proposed lease with Superpetz by refusing to vacate the premises.

At the core of this litigation is a commercial property located at 4833 Carlisle Pike, Mechanicsburg, Pennsylvania, leased by Main Realty Holding Trust to Jewelcor on May 11, 1976, for an initial term

of twenty-five years with a right to renew in favor of tenants in accordance with the terms of the agreement. The lease provided that Jewelcor could only sublet the premises to a third party with the written consent of lessor which could not be unreasonably withheld. M & G purchased the Mechanicsburg property from Main Realty Holding Trust in 1989 and received an assignment of the lease. In January, 1990, Jewelcor sought M & G's permission to sublet to Office Max, Inc., and in August, 1990, to sublet to Office Depot, Inc., but, on both occasions, consent was not given. On October 5, 1990, Jewelcor and thirteen related entities (hereafter J.J.D.), as Debtors-in-Possession, filed petitions for relief under Chapter 11 of the Bankruptcy Code. In February, 1991, plaintiffs filed a Motion to Assume which included a request to assume the lease of the Mechanicsburg property but, according to the Karfunkel defendants, while the Motion to Assume was pending in Bankruptcy Court, plaintiffs filed an Adversary Proceeding which "contradicted its motion to assume by asserting that (i) Jewelcor or its principal had reached an agreement with M & G for early termination of the lease; (ii) M & G had reneged in payment of the consideration it allegedly agreed to pay for an early termination of the lease, and (iii) M & G should be forced to specifically perform the oral contract it allegedly entered into with Jewelcor or its principal." (Doc. 10, pp.2-3).[3]

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[3] Defendants contend that Jewelcor stopped remitting rental payments shortly after filing the petition in bankruptcy

(Continued on following page)

However, after the joint consensual plan of reorganization became effective on May 1, 1991, MJS, as successor to JJD, received an assignment of the lease of the Mechanicsburg property provided that it cure all defaults which existed under the lease. (Doc. 13, p.2 & Doc. 10, p.4). Subsequently, a plan of reorganization was confirmed by the Bankruptcy Court on April 15, 1991, and became effective on May 1, 1991.

Plaintiffs further allege that on August 20, 1992, in violation of the lease, defendant M & G entered into an agreement with defendant The Salvation Army for sale of the premises located at 4833 Carlisle Pike and that, pending consummation of the sale, M & G and The Salvation Army entered into a lease of the premises at issue on November 9, 1992. (Doc. 13, pp. 2-3). Defendants assert that, contrary to its present contention, Jewelcor represented to the Bankruptcy Court that, "as far as it was concerned, the lease no longer existed and that Jewelcor would be willing to consent to a prospective sale of the premises as long as an escrow of sale proceeds was established sufficient to cover the damages Jewelcor was seeking in its adversary action to secure specific performance of the termination agreement." (Doc. 10, p.3). Plaintiffs counter that M & G continued to receive improper lease payments from The Salvation Army despite plaintiffs' entitlement to exclusive

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court, and also ceased using the property for retail purposes but continued to store fixtures at the location. (Doc. 10, p.3).

possession of the location. (Doc. 13, p.3). In November of 1994, plaintiffs filed another Adversary Proceeding in the Bankruptcy Court seeking damages for breach of the lease and unjust enrichment based on the above allegations.

As previously noted, the plaintiffs argue that M & G wrongly and unreasonably withheld its consent to sublease the Premises. (Doc. 13, p.3). In addition to the Office Max and Office Depot requests, plaintiffs also sought consent unsuccessfully in 1995 to sublet the premises to Superpetz. They contend that both M & G and The Salvation Army knew, or reasonably should have known, that plaintiffs entered into a Letter of Intent with Superpetz, and that M & G's consent to the sublease was required in order for the sublease agreement to be consummated. Moreover, according to plaintiffs, both M & G and The Salvation Army knew, or reasonably should have known, that Jewelcor assumed the lease and, therefore, was entitled to exclusive possession of the premises on July 11, 1995. (Doc. 13, p.3). Yet, plaintiffs argue, M & G extended the lease to The Salvation Army subsequent to the assumption of the lease by plaintiffs "for the purpose of depriving Plaintiffs of possession of the Premises" and preventing plaintiffs from consummating the proposed sublease with Superpetz. (Doc. 13, p.4). Further, they claim that they directed The Salvation Army to vacate the Premises, and that The Salvation Army "wilfully" refused to do so, constituting a continuing trespass upon plaintiffs' property. The Salvation Army's

actions were, according to plaintiffs, "unlawful and improper and, thus, there was no privilege or justification" for the interference with the Superpetz sublease.

On October 31, 1996, plaintiffs filed an amended complaint in the Bankruptcy Court seeking damages for breach of lease, unjust enrichment and intentional interference with prospective and existing contractual relations.[4] (Doc. 14, p.3). The Karfunkel defendants filed motions to dismiss the amended complaint in the Bankruptcy Court for lack of jurisdiction, expiration of the statute of limitations, violations of the doctrines of laches, equitable and judicial estoppel, failure to arbitrate, and failure of plaintiffs to properly plead a cause of action for intentional interference with prospective and existing contractual relations. Finally, that the defendants had not engaged in any wrongful conduct and that the lease contained language absolving them, as landlord, of any liability except to the extent of their equity in the premises. (Doc. 14, p.3-4). By decision dated February 9, 1999, the Bankruptcy Court held that it did not have jurisdiction over the dispute. *Id.* The instant action followed.

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[4] The Karfunkel defendants concede that the amended complaint in the Bankruptcy Court is "substantially identical" to the complaint filed in the instant case on July 15, 1999. (Doc. 14, p.3).

After considering the various contentions presented by the parties, it is concluded that (a) this court has jurisdiction under 28 U.S.C. § 1332 and 28 U.S.C. § 1334(a); only Count II is barred by the Statute of Limitations; factual disputes exist which preclude the granting of the motion as to judicial/equitable estoppel and the arbitration clause; and, finally, the Karfunkel defendants are exculpated from personal liability under the lease. Thus, the motion to dismiss of the Karfunkel defendants will be granted. As to the Salvation Army defendant, the motion to dismiss will be granted on Counts IV and VIII because of the absence of causation but will be denied as to Count VII inasmuch as there exists a factual dispute on the claim of trespass.

Discussion – Karfunkel Defendants

Jurisdictional Challenges: Federal Rule of Civil Procedure 12(b)(1)

Initially, the Karfunkel defendants seek to have the present case dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction as required by 28 U.S.C. § 1334(b) and 28 U.S.C. § 1332. The former provision states, in pertinent part, that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The latter jurisdictional provision provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or

value of $75,000, exclusive of interests and costs. . . ." 28 U.S.C. § 1332(a).

A. 28 U.S.C. § 1334(b)

Defendants first argue that this Court does not have proper jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) because plaintiffs filed an amended complaint in the Bankruptcy Court, which is "virtually identical" to the complaint in the instant case, and that the amended complaint was dismissed by the Bankruptcy Judge for lack of jurisdiction pursuant to 28 U.S.C. § 1334(b). Therefore, according to defendants, because the February dismissal of the complaint on these grounds in the Bankruptcy proceedings was not appealed, it is final and, may not now be re-litigated in this Court. (Doc. 10, p.5). Plaintiffs, in their brief in opposition to the Karfunkel defendants' motion to dismiss, do not address this argument.

While the statutory provision at issue properly applied to the bankruptcy proceedings, the language of that subsection (b) is clear and unambiguous: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). At this point in the litigation, it appears that the allegations in plaintiffs complaint meet this jurisdictional definition since they arose from events which occurred during, or as a direct result of, plaintiffs' filing for relief under title 11. In

addition, according to the statute above, the district court has jurisdiction over cases arising "in or related to cases under title 11 and the absence of an appeal does not deny this court of jurisdiction under the statute". *Id.* This Court's jurisdiction fits squarely within the clear language of 28 U.S.C. § 1334(b) and, thus, defendants' motion to dismiss for lack of jurisdiction pursuant to 28 U.S.C. § 1334(b) will be denied.

B. 28 U.S.C. § 1332(a)

28 U.S.C. § 1332 confers jurisdiction on this Court based upon diversity of citizenship and a minimum amount in controversy. In the present case, while the element of diversity of citizenship is not disputed, defendants argue that plaintiffs cannot meet the minimum $75,000 amount in controversy requirement for counts III-VII in the complaint. Plaintiffs counter that defendants admittedly have no evidence at present to support their position, and that even if the amount in controversy may fall short of the jurisdictional threshold of $75,000 for one or more counts, the Court should exercise its discretion to entertain those allegations by asserting supplemental jurisdiction over those claims.

The standard for determining whether a plaintiff's claims satisfy the amount in controversy requirement was established by the United States Supreme Court in 1938: the rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the

sum claimed by the plaintiff controls if the claim is apparently made in good faith. *See Suber v. Chrysler Corp.*, 104 F.3d 578, 583 (3d Cir. 1997) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938)). While courts will generally accept a party's good faith allegation of the amount in controversy, if it is challenged by either the opposing party or the court, the party seeking the assistance of the federal court must provide sufficient evidence to justify its claims. *See Lauchheimer v. Gulf Oil,* 6 F. Supp.2d 339, 343 (D.N.J. 1998). Specifically, when the amount in controversy is challenged, the determination must be made from an examination of the complaint at the time it was filed. *Id.* (citing *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1961)). "This is not true, however, if upon the face of the pleadings or other proof submitted, it 'appears to a *legal certainty* that the claim is really for less.'" *Lauchheimer,* 6 F. Supp.2d at 343 (quoting *St. Paul Mercury,* 303 U.S. at 288-89 (emphasis added)). In applying the "legal certainty" standard established by *St. Paul Mercury,* the Third Circuit Court of Appeals stated that "dismissal is appropriate only if the federal court is *certain* that the jurisdictional amount cannot be met."[5] *Suber,* 104 F.3d at 583 (quoting *Columbia Gas*

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[5] Once the plaintiff establishes the good faith pleading which meets the jurisdictional amount in controversy requirement, the district court retains jurisdiction even if the plaintiff does not succeed on the claims presented or ultimately recovers an amount which does not meet the jurisdictional requirement.

(Continued on following page)

Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir.1995) (emphasis added)). The question of whether a plaintiff's claims satisfy the "legal certainty" standard is subject only to minimal scrutiny of the allegations in the complaint.[6] *See Suber,* 104 F.3d at 583.

It appears that plaintiffs have, in good faith, alleged damages exceeding the $75,000 amount in controversy as required by 28 U.S.C. § 1332(a). While defendants challenge that contention in certain counts of the complaint, they offer no evidence at this stage of the litigation to substantiate the amount in controversy protest: "M & G are pursing [sic] discovery on this Motion. It is believed that discovery will demonstrate that within a very short time of allegedly losing the original Superpetz's [sic] lease, Jewelcor entered into a new lease with Superpetz under substantially the same terms." (Doc. 10, p.6). In evaluating the complaint as of the time of filing (which, as defendants concede, is virtually identical to the amended complaint filed in the bankruptcy proceedings) and subjecting the allegations at issue

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See Suber, 104 F.3d at 583 (citing *St. Paul Mercury,* 303 U.S. at 288).

[6] The Court, in its jurisdictional inquiry, should not consider the legal sufficiency of plaintiff's contentions nor whether the legal theory advanced by the plaintiff is sound. *See Suber,* 104 F.3d at 583. Therefore, the "threshold to withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(1) is thus lower than that required to withstand a Rule 12(b)(6) motion." *Id.* (quoting *Lunderstadt,* 885 F.2d (quoting *Lunderstadt v. Colafella,* 885 F.2d 66, 70 (3d Cir. 1989)).

only to minimal scrutiny, there are no grounds to conclude that, as a matter of legal certainty, those challenged allegations fall short of meeting the amount in controversy requirement. Consequently, defendants' motion to dismiss the complaint based upon lack of jurisdiction for failure to meet the amount in controversy element of diversity jurisdiction will be denied.[7]

II.

Failure to State a Claim: Federal Rule of Civil Procedure 12(b)(6)

Both the Karfunkel defendants and The Salvation Army have moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on several grounds. Federal Rule of Civil Procedure 12(b)(6) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be

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[7] Even if this Court were to find that the jurisdictional amount in controversy was not met in some of plaintiff's counts, the Court would exercise its discretion and invoke supplemental jurisdiction over the claims at issue pursuant to its authority under 28 U.S.C. § 1367, which states in relevant part, that: "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." All of the claims in the complaint are related and form part of the "same case or controversy" under Article III. *See*, U.S. CONST. art. III.

granted." Fed. R. Civ. P. 12(b)(6). However, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The test in reviewing a motion to dismiss for failure to state a claim is whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief. *See Holder v. City of Allentown,* 987 F.2d 188, 194 (3d Cir. 1993) (citation omitted). Additionally, a Court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them. *See Markowitz v. Northeast Land Co.,* 906 F.2d 100, 103 (3d Cir. 1990); *Indep. Enters., Inc. v. Pittsburgh Water & Sewer Auth.,* 103 F.3d 1165, 1168 (3d Cir. 1997).

A. Statute of Limitations/Doctrine of Laches

The Karfunkel defendants assert that all counts in the complaint are barred by the statute of limitations and/or the doctrine of laches because the instant case was not commenced until July 15, 1999, and the events at issue all occurred prior to July of 1995. (Doc. 6). Plaintiffs rebut this assertion by citing to 42 Pa.C.S.A. § 5535(a) as an applicable tolling statute, which provides, in pertinent part, that "[i]f a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the

same cause of action within one year after the termination. . . ." 42 Pa.C.S.A. § 5535(a)(1). While there are exceptions to this provision, the Court agrees with plaintiffs that none apply in the instant case.[8] Defendants argue that in a diversity action, a Federal Court becomes another Court of the State and cannot afford recovery if the right to recovery is made unavailable by the State. Building on this, defendants claim that the filing of the complaint in the Federal Bankruptcy Court does not toll the Statute of Limitations here because an action in a United States Court would not toll the running of the Statute of Limitations in a State Court. While this recitation of Pennsylvania case law is correct, it does not follow that in diversity actions this court must be viewed as a State Court and, in effect, a separate jurisdiction from a U.S. Bankruptcy Court. All the cases cited by defendants involve a State Court vis-a-vis, a Federal Court and none involve two Federal Courts. The legislative purpose in adopting § 5535(a) would be frustrated if defendants' contention was accepted. Consequently, it is rejected.

The original adversary proceeding was filed in the Bankruptcy Court in November of 1994 alleging

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[8] The exceptions include actions to recover damages for personal injury or wrongful death caused by the "wrongful act or neglect or unlawful violence or negligence of another," and actions terminated by "voluntary non-suit, a discontinuance, a dismissal for neglect to prosecute the action or proceeding, or a final judgment on the merits." 42 Pa.C.S.A. § 5535(a)(2) (I & ii).

unjust enrichment and breach of contract. The amended complaint, admittedly substantially similar to the one filed in the present case, was filed in October of 1996 and contained claims of intentional interference with existing and prospective contractual relations in addition to the claims in the original complaint of November 1994. The Federal Rules of Civil Procedure permit amended pleadings to relate back to the date the original pleading was filed for statute of limitations purposes. Pursuant to the federal rules, amended pleadings relate back to the date of the original pleading when "the claim or defense asserted in the pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). All counts in the original and amended complaints filed with the Bankruptcy Court are breach of contract claims, and as such are subject to the four year statute of limitations period pursuant to 42 Pa.C.S.A. § 5525.[9]

In evaluating compliance with the four year statute of limitations period, it first must be determined whether the claims presented in the original complaint dated November 17, 1994, were timely filed

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[9] However, defendants argue that although "Court [sic] I is couched in terms of a breach of lease, what Jewelcor really seeks is damages for M & G's alleged eviction of Jewelcor from the Premises, i.e. for M & G trespass [sic] to Jewelcor's interest in the realty." (Doc. 10, p.7). The court believes this contention lacks merit, and the four year limitations period for breach of contract applies in the instant case.

in the Bankruptcy Court. Of the two claims presented in that original adversary proceeding, Count II alleging breach of the lease agreement for unreasonably withholding consent to sublease the premises is time barred under the four year limitations period. The complaint indicates that consent was allegedly unreasonably withheld in January and August of 1990, but the adversary proceeding was not filed until November 17, 1994. Consequently, because the claims of breach of lease were not filed within the four year period allotted contract actions, those assertions would have been untimely in the bankruptcy proceedings. Moreover, in order for Rule 15(c) to prevent the statute of limitations from barring a claim by allowing a relation back, the original pleading must have been timely filed. Because Count II of the instant complaint was not timely filed in the original adversary proceeding, the relation back argument presented by plaintiffs fails, and Count II will be dismissed as untimely. However, the remaining count in the original complaint of November, 1994, i.e., whether the Karfunkel defendants were unjustly enriched by rental payments received from The Salvation Army, was timely presented to the Bankruptcy Court since those rental payments were not received until late 1992. Thus, the next step in determining whether the remaining claims at issue are timely before this Court is to assess the applicability of the amended pleading in the bankruptcy proceedings and whether Rule 15(c) applies to relate the amended pleading back to the original filing in 1994.

Amended pleadings relate back to the date of the original pleading when "the claim or defense asserted in the pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). The amended complaint filed by plaintiffs in the bankruptcy proceedings on October 31, 1996 concerned events arising out of the same conduct alleged in the original complaint, specifically, that defendants acted in a manner inconsistent with plaintiffs purported legal interest in the premises. Thus, the requirements set forth in Rule 15(c)(2) are met. Consequently, the amended complaint of October 1996 relates back to the original complaint filed in 1994 and, with the exception of Count II, was timely filed for statute of limitations purposes.

Because the remaining counts contained in the amended complaint were timely, the last consideration is whether the instant action was filed within the one year grace period afforded the parties by 42 Pa.C.S.A. § 5535(a). The Bankruptcy Judge's decision was handed down in February of 1999. As both parties recognize, the Bankruptcy Judge's decision to dismiss the action was premised on the fact that the Bankruptcy Court lacked jurisdiction over the matter and, as such, was not a final judgment on the merits of the case. As the instant action was commenced in July of 1999, within the one year prescribed by 42 Pa.C.S.A. § 5535(a) from the dismissal of the bankruptcy proceeding for lack of jurisdiction, the statute of limitations can only bar the claim presented in

Count II of the complaint, and not the remaining counts. Thus, the motion to dismiss the complaint for violation of the statute of limitations will be granted only as to Count II, and denied in all other respects.

The Karfunkel defendants also assert that Counts V and VI should be dismissed based on the doctrine of laches. Laches is "an equitable doctrine committed to the sound discretion of the trial court." *Wallace v. Hardee's of Oxford, Inc.,* 874 F. Supp. 374, 472 (M.D. Ala. 1995) (quoting *United States v. Davis,* 817 F. Supp. 926, 929 (M.D.Ala.1993), *aff'd,* 17 F.3d 1439 (11th Cir.1994)). Generally, the doctrine of laches applies only in cases where it would be inequitable to permit a party to enforce his legal rights because of an unjustifiable lapse of time which resulted in undue prejudice or an injustice to another. *See Socony Mobil Oil Co., Inc., v. Continental Oil Co.,* 335 F.2d 438, 441-442 (10th Cir. 1964) (citing *Pfister v. Cow Gulch Oil Co.,* 189 F.2d 311 (10th Cir.1951), *cert. denied,* 342 U.S. 887 (1951)). Whether a delay has been injurious to a party depends upon the facts and circumstances of each case. *See Socony Mobil Oil Co.,* 335 F.2d at 442.

As noted above, the original complaint, the amended complaint and the complaint in the present case all arose from the same conduct. Defendants have had adequate notice of the allegations in plaintiffs' complaint, and therefore have suffered no prejudice. The delay in filing in this Court certainly cannot be posited as inequitable since the filing here followed the Bankruptcy Court's dismissal by only five

months. Thus, the defense of laches fails, and the motion to dismiss for undue delay in filing will be denied.

B. Equitable and Judicial Estoppel

In the motion to dismiss, the Karfunkel defendants also argue that plaintiffs are precluded from pursuing the present cause of action by judicial and equitable estoppel because the action was not disclosed to the creditors in the Bankruptcy Schedules, Statements of Financial Affairs, Plan, and Disclosure Statement filed in connection with the original bankruptcy proceedings. (Doc. 10, p.8). Defendants rely on *Oneida Motor Freight, Inc. v. United Jersey Bank* to support this position. 848 F.2d 414 (3d Cir. 1988), *cert. denied,* 488 U.S. 967 (1988). Plaintiffs counter that *Oneida Motor Freight* is distinguishable and an inappropriate basis for dismissal in this case. (Doc. 14, p.10).

However, plaintiffs, in their Supplemental Reply Brief (Doc. 23), maintain that disputed factual averments exist precluding a ruling on this issue at this time. A close reading of the record and briefs seem to support this position as there does appear to be a need for further development of pertinent facts on this issue. For example, defendants dispute plaintiffs' claim that when the Bankruptcy schedules were being prepared in 1990 and early 1991, they did not know that defendants would evict them from the premises. More importantly, however, is the question

of intent and knowledge which are subjective and must be addressed in order to determine whether the alleged concealment was the product of bad faith or inadvertence. The court would not be comfortable with ruling on this issue without a clearer picture as to what actually occurred. The motion to dismiss on the grounds of equitable/judicial estoppel will be denied.

C. Personal Liability

The lease agreement contains the following provision:

> (b) Landlord shall not be personally liable to Tenant for any damages sustained by Tenant under any expressed or implied covenant of this lease. Tenant agrees to look solely to the then equity of Landlord in The Premises for the satisfaction of the remedies by Tenant in the event of a breach by Landlord of any of the covenants or conditions hereof.

Such an exculpatory clause must not contravene public policy; it must be between persons relating entirely to their own private affairs; and each party must be a free bargaining agent so that the contract is not one of adhesion. Plaintiffs do not claim that these prerequisites are not satisfied in this action.

The applicable rules of construction are set forth in *Topp Copy Products, Inc. v. Singletary,* 533 Pa. 468, 626 F.2d 98 (1993), as follows:

> (1) The contract language must be construed strictly, since exculpatory language is not favored by the law; (2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties; (3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and (4) the burden of establishing the immunity is upon the party invoking protection under the clause.

Id. at 471, 626 A.2d at 99.

The named Landlord in the lease is M & G Equities, a partnership consisting of the individual defendants as general partners. Plaintiffs, citing 15 Pa. C.S.A. § 8327 and *LaFountain v. Webb Indus. Corp.*, 759 F. Supp. 236, 242 n.3 (E.D. Pa. 1991), point out that, under Pennsylvania law, a general partner can be held individually liable for wrongs committed by the partnership. However, defendants contend that the exculpatory language of the lease releases the Landlord, from any *personal* liability for *any damages* sustained by the Tenant under *any* express or implied covenant of the lease. Defendants argue further that in the event of a breach of *any* of the covenants or conditions of the agreement by the Landlord, the Tenant's remedies are limited to "the then equity of Landlord in the Premises." Plaintiffs counter that the exculpatory clause in the agreement is invalid, raising two arguments: (1) that their

claims " . . . are not *all* based upon express or implied covenants of the Lease" (Doc. 14, p. 12) (emphasis added); and (2) that the two sentences in the lease exculpating the Landlord "are ambiguous and capable of varying interpretations."[10]

The first argument is that the exculpatory language addresses only breaches of the lease and, thus, would not apply to Count IV (tortious interference) and Counts V and VI (unjust enrichment). However, notwithstanding plaintiffs identification of these counts, they still depend upon, and arise from, alleged breaches of the lease in denying possession of the premises to plaintiffs and withholding permission to sublet, which prevented them from subleasing to Superpetz and allowed defendants to continue collecting rent from Good's Furniture and The Salvation Army. Counts V and VI allege that defendants were unjustly enriched by leasing and accepting rental payments which could only be "unjust" if the instant lease had been violated. The allegations in Count IV do not refer to any conduct other than defendants' failure to abide by the terms of the lease.[11]

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[10] "Thus, if this Court concludes that these two sentences do not constitute a valid exculpatory clause, the Karfunkel Defendants, as general Partners, can be held individually liable for wrongs committed by the partnership." (Doc. 19, p. 29).

[11] Paragraphs 85-95 of the complaint read as follows:

85. Plaintiffs and Superpetz entered into a Letter of Intent on February 15, 1995 to sublet the

(Continued on following page)

Premises to Superpetz, and entered into the Superpetz Sublease on July 10, 1995.

86. Pursuant to the terms of the Lease, Plaintiffs requested that M & G consent to the Superpetz Sublease.

87. M & G and the Salvation Army knew, or reasonably should have known, that M & G's timely written consent was required before Plaintiffs could consummate the Superpetz Sublease.

88. M & G unreasonably and in violation of the Lease failed to consent to the Superpetz Sublease.

89. M & G and the Salvation Army knew, or reasonably should have known, that Plaintiffs had assumed the Lease, that Plaintiffs were entitled to possession of the Premises subsequent to the assumption, and that the purported lease agreement between M & G and the Salvation Army, and any extensions thereof, were in direct conflict with the Plaintiffs' right to possession of the Premises.

90. M & G and the Salvation Army knowingly entered into an extension agreement subsequent to the assumption of the Lease by Plaintiffs for the purpose of depriving Plaintiffs of possession of the Premises and of preventing the consummation of the Superpetz Sublease.

91. M & G and the Salvation Army knew, or reasonably should have known, that the Non-Disturbance Agreement was required before Plaintiffs could consummate the Superpetz Sublease.

92. M & G unreasonably and in violation of the Lease failed to provide to Plaintiffs the requested Non-Disturbance Agreement for the purpose of preventing Plaintiffs from exercising their rights

(Continued on following page)

The second contention of ambiguity is similarly unpersuasive. Specifically, plaintiffs assert that:

> . . . the two sentences relied upon by the Karfunkel defendants are ambiguous and capable of varying interpretations. For instance, the first sentence . . . which must be strictly construed . . . makes no reference to any breach of a lease covenant or conditions. In the instant matter, plaintiffs do not aver that any covenants or conditions of the Lease caused damages but rather allege, in part, that the Karfunkel Defendants' substantial breaches of the Lease caused Plaintiffs to suffer damages. The provision is certainly not clear, particular and unambiguous and must also be construed against the Karfunkel Defendants. (Doc. 19 p. 28).

As previously noted, the lease clearly states that the Landlord is not liable to Tenant for *any* damages

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and receiving the benefits of the Superpetz Sublease.

93. The intentional and purposeful actions of M & G and the Salvation Army were unlawful and improper, and thus there is no privilege or justification for M & G's and the Salvation Army's interference with the Superpetz sublease.

94. As a direct result of M & G's and the Salvation Army's misconduct, Superpetz terminated the Superpetz Sublease.

95. The intentional and purposeful actions of M & G and the Salvation Army have resulted in actual damages to Plaintiffs.

sustained under *any* expressed or implied covenant of the lease. Plaintiffs seem to argue that "breaches of the Lease" is something different from breaches of the covenants and conditions of the Lease. However, there is no identification of any portion of the Lease other than "any expressed or implied covenants or conditions", that were breached. The first sentence of (b) can only be viewed as intending to relieve the Landlord of all *personal* liability and the second sentence expressly limits all remedies of the Tenant to the *Landlord's equity* in the premises. Any effort to impose personal liability on defendants would violate the obvious intent expressed in (b). Moreover, plaintiffs do not assert that the Karfunkels, as individual defendants, acted in any way other than through the partnership. Therefore, because the exculpatory clause contained in the lease agreement is valid and enforceable, the motion to dismiss George and Michael Karfunkel, individually and M & G Equities, a general partnership, will be granted and plaintiffs' remedies for any purported breach of the lease will be limited to the "then equity" of the Landlord in the premises at issue.

D. Arbitration

Defendants maintain that plaintiffs must resort to arbitration concerning Counts II and III but, at the same time, contend that they are time barred from pursuing this remedy. Plaintiffs counter by insisting that defendants waived the arbitration requirements by failing to demand arbitration prior to plaintiffs'

filing of the November, 1994, complaint. While conceding this fact, defendants note that they raised the arbitration issue in their motion to dismiss the Amended Complaint. Plaintiffs also resist defendants argument that they raised the issue of arbitration "at the earliest possible opportunity." Of most significance, however, is plaintiffs' claim that both parties engaged in extensive discovery in the Bankruptcy proceeding while defendants deny that there was any discovery relative to Counts II and III although there was some discovery in the collateral action to enforce the alleged settlement for early termination of the lease. The resolution of those disagreements would be required before the court could fully examine the issue of waiver. Moreover, the question of prejudice to the plaintiffs would require further development and explanation. As a result, at this time, the defense that plaintiffs must resort to arbitration on Counts II and III will be rejected.

Discussion – Salvation Army Defendant

As previously noted, Counts [sic] IV (intentionally interfering with Superpetz sub-lease), Count VII (trespass in occupying the premises), and Count VIII (intentional interference by refusing to vacate the premises) are asserted against the Salvation Army. In essence, plaintiffs claim that the Salvation Army knew, or should have known (a) that plaintiffs entered into a Letter of Intent on February 15, 1995, to sublet the premises to Superpetz and executed the sublease on July 10, 1995; (b) that plaintiffs

requested M & G's consent to the Superpetz sublease; (c) that plaintiffs assumed the lease on July 11, 1995, and were entitled to possession of the premises; and (d) that the Salvation Army entered into an extension agreement with M & G for the purpose of denying possession to plaintiffs and preventing them from consummating the Superpetz sublease.

In its Rule 12(b)(6) motion, defendant raises two defenses: (1) there is no causal connection as a matter of law between its conduct and the loss of the Superpetz sublease, and (2) that a claim of interference with the right of possession fails unless plaintiffs were in actual possession.

On the issue of causation, defendant insists that even "(i)f the Salvation Army had vacated the premises on July 11, 1995, the refusal of M & G to consent to the sublease would still have prevented Superpetz from occupying the premises." (Doc. 15, p. 2). The court agrees with this statement. Despite plaintiffs' allegations of knowledge of the background between them and Superpetz, as well as the claimed purpose of defendant in entering into an extension of the lease, the sublease with Superpetz would be unenforceable without M & G's consent[12] even if plaintiffs were entitled to possession. Therefore, the motion to dismiss as to Counts IV and VIII will be granted.

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[12] The record indicates that on August 6, 1995, M & G refused to consent to the Superpetz sublease. There is no allegation that defendant played any part in this decision of M & G.

Count VII does not implicate the Superpetz lease but asserts that after plaintiffs were entitled to possession, defendant trespassed upon plaintiffs' property when it willfully refused to vacate the premises despite being directed by plaintiff to do so.

On the question of the need for possession to satisfy an action in trespass, both parties cite *Humes v. Kramer,* 286 Pa. 251, 133 A 262 (1926) and *Collins v. Beatty,* 148 Pa. 65, 23A. 982 (1892). In addition, defendant refers to *Kossell v. Rhoades,* 272 Pa. 75, 116 A 56 (1922) in support of its position. *Humes* appears to hold that the owner of an improved property has a choice of remedies against an intruder to either compel withdrawal or recover compensatory damages. If title is disputed than [sic] an action in ejectment must be pursued initially to establish ownership. This is also the holding in *Kossell.* Both cases, however, involved unimproved lands. Nevertheless, the *Humes* court, citing *Kossell,* noted that, where the property is improved, "more than an implied holding must appear . . . (b)ut . . . the right to immediate possession by the plaintiff will suffice". Consequently, the allegations in Count VII are sufficient under the standard applicable to a motion to dismiss and plaintiffs are entitled to proceed with this claim.

/s/ William Nealon
United States District Judge

Date: 2-22-00

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JEWELCOR INCORPORATED, JEWELCOR JEWELERS AND DISTRIBUTORS, INC., and MARKETING OF JEWEL SERVICES, INC.,	:	
Plaintiffs,	:	CIVIL NO.
vs.	:	3:99-CV-1251
MICHAEL KARFUNKEL and GEORGE KARFUNKEL, individually and M & G EQUITIES, a general partnership, and THE SALVATION ARMY,	:	(JUDGE NEALON)
Defendants	:	

ORDER

Now, this 22nd day of February, 2000, it is ordered that

(1) the motion to dismiss filed by defendants, Michael Karfunkel, George Karfunkel, and M & G Equities is granted on Counts I, II, III, IV, V and VI as to personal liability but is denied to the extent of defendants' equity in the premises at 4833 Carlisle Pike, Mechanicsburg, Pa.;

(2) the motion to dismiss filed by defendant, the Salvation Army, is granted on Counts IV and VIII but denied on Count VII.

/s/ William Nealon
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-2244, 05-4121 & 06-4003

JEWELCOR INCORPORATED;
JEWELCOR JEWELERS AND DISTRIBUTORS,
INC.; MARKETING OF JEWEL SERVICES CORP.,

Appellants in No. 05-4121

v.

MICHAEL KARFUNKEL; GEORGE KARFUNKEL;
M & G EQUITIES; THE SALVATION ARMY

MICHAEL KARFUNKEL and GEORGE
KARFUNKEL, individually and as partners
trading as M & G Equities,

Appellants in No. 05-2244 & 06-4003

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:99-cv-1251)
District Judge: Honorable William J. Nealon

ORDER AMENDING OPINION

It appearing that the opinion filed February 11, 2008 was incomplete inasmuch the Clerk failed to attach the dissent, the opinion is hereby amended to include the dissent. The opinion will be republished

in its correct form and it will be transmitted to all parties. Appellees/Cross-Appellants may file a new petition for rehearing en banc within fourteen (14) days of the date of this order.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: March 13, 2008

lwc/cc: Robert C. Nowalils [sic], Esq.
Geff Blake, Esq.
George A. Reihner, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No: 05-2244

JEWELCOR INCORPORATED; JEWELCOR JEWELERS AND DISTRIBUTORS, INC.; MARKETING OF JEWEL SERVICES CORP.

v.

MICHAEL KARFUNKEL; GEORGE KARFUNKEL; M & G EQUITIES; THE SALVATION ARMY

MICHAEL KARFUNKEL and GEORGE KARFUNKEL, individually and as partners trading as M & G Equities,

Appellants

Case No: 05-4121

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Appellants

v.

MICHAEL KARFUNKEL; GEORGE KARFUNKEL, individually and as partners trading as M & G Equities; M&G EQUITIES; SALVATION ARMY

Case No: 06-4003

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v.

MICHAEL KARFUNKEL; GEORGE KARFUNKEL; M & G EQUITIES; THE SALVATION ARMY

MICHAEL KARFUNKEL and GEORGE KARFUNKEL, individually and as partners trading as M & G Equities,

Appellants

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and GREENBERG, Circuit Judges* and POLLAK, District Judge**

The petition for rehearing filed by appellees/ cross-appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available

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* The vote of the Honorable Morton I. Greenberg, Senior United States Circuit Judge, is limited to panel rehearing.

** The vote of the Honorable Louis H. Pollak, Senior United States District Judge, is limited to panel rehearing.

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: April 30, 2008

lwc/cc: Geff Blake, Esq.
George A. Reihner, Esq.
Robert C. Nowalis, Esq.